INSTRUCTIONS FOR HEALTH CARE CONSENT FORM

GENERAL INFORMATION

This form is designed to follow the requirements of S.C. Ann. §44-66-10 (Supp.2007), known as the Adult Health Care Consent Act (AHCCA). The AHCCA spells out a process in which two physicians perform independent evaluations of an adult and certify whether the person is able to consent to his/her health care. This establishes allows a mechanism in which surrogate health care decision-makers are subsequently identified according to a specific priority set out in the AHCCA.

A specific issue raised is the concept of "unable to consent" which means that an adult is either:

1. unable to appreciate the nature and implications of his/her condition in proposed health care,
2. unable to make a reasoned decision concerning the proposed health care, or
3. unable to communicate that decision in an unambiguous manner.

"Health care" is defined in the AHCCA as procedures to diagnose or treat a human disease ailment, defect, abnormality, or complaint whether of physical or mental origin. It specifically states that it also includes provision of intermediate or skilled nursing care as well as services for the rehabilitation of injured, disabled, or sick persons in the placement in or removal from a facility that provides these forms of care. If independent evaluations by two physicians result in a patient being certified as displaying an inability to consent, this sets the stage for selecting a surrogate decision maker to act on behalf of the patient. The certification is a <u>major decision</u> with significant and profound implications for the adult who is being certified as unable to consent and therefore, the examination as well as the documentation should thoroughly and specifically demonstrate evidence of the inability to consent. The AHCCA specifically <u>does not apply to minors</u> unless they are legally married or have been determined to be emancipated. There are also specific steps that can be taken in an <u>emergency</u> that will be dealt with separately. **Note: The ability to consent must take into consideration each person's capability to understand each procedure, therefore blanket consents for all persons receiving services and/or "all or none" consents are strongly discouraged**.

SECTIONS I and II: - PROPOSED HEALTH CARE and CERTIFICATION OF INABILITY TO CONSENT

Starting at the beginning of the document, the full legal name of the person should be entered on the line as well as the date of the certification process.
Section I - Enter the proposed health care procedure, medical or other event that is "triggering" the need to evaluate the person's ability to give informed consent.
Section II - First Part - The physician certifies that he/she has examined the person and that the person is:

a. Unable to appreciate the nature and implications of his/her condition and the proposed health care,
b. Unable to make a reasoned decision concerning the proposed health care and/or,

c. Unable to communicate a decision concerning the proposed healthcare in an unambiguous manner.

The physicians are to check the boxes that apply.

Section II – Second Part - The physicians state the specific bases for their medical opinions and conclusions.

1. The **cause** is defined as the injury, insult, disease or condition that is thought to be responsible for the inability to consent. Some examples of cause would include prematurity, birth trauma/hypoxia, severe closed head injury with persistent neurological deficits, Trisomy 21, or other known or suspected disease. Obviously, the cause of the insult leading to the cognitive and developmental deficits in many service users is not known and therefore "unknown" is an appropriate response.

2. The **nature** of the person's inability to consent is generally defined as the degree of developmental disability, i.e., profound mental retardation with full scale IQ of 10, etc. It is important in this section that the physicians give specific examples of the degree of impairment. An example of this would be "non-verbal and unable to communicate using assistive technology," "patient is unable to follow a three-step command," "patient is unable to recall examiner's name," etc. Demonstration of an inability to perform simple tasks would be consistent with significant cognitive impairment and an inability to appreciate the various health care choices and make a reasoned decision concerning alternatives. If use of any evaluation in the person's file/record is made, then the physician should reference that evaluation in the comments for this section.

3. The **extent** of the person's inability addresses specific areas where the individual can not make informed decisions. This would be areas where the individual's cognitive limitations prevent him/her from adequately evaluating the different options for making decisions. This section of the document is designed to draw parameters around the inability to consent and still leave other areas in which the individual may be able to consent unaffected. For example, a person maybe unable to make informed decisions about psychotropic medications; however, he/she may be able to understand a simple two step option such as a restrictive BSP that used time loss of a home visit as a consequence for inappropriate behavior. In this situation, the restrictive BSP would be a simple matter of understanding cause and effect and someone with limited cognitive abilities may very well be able to understand this option. Therefore, in the extent area, list only the areas where the person is unable to give full informed consent.

The Explanation of Exceptions section would address areas where the person can give informed consent.

4. The **probable duration** of the person's inability to consent is an estimate of how long the disabling condition will last. For many individuals this will be life long due to the chronic nature of

their disability. However, even if lifelong, the inability to consent must be reviewed on a yearly basis.

3. A **delay in application** refers to situations where the inability to consent is believed to be a temporary condition. However, with a majority of persons the inability to consent is going to be a chronic condition, such as mental retardation.   If this is the case, check the "yes" box indicating that it is not feasible to wait an extended period for the person's cognitive ability to improve to give consent. Clearly, for many of persons checking "yes" indicates that the proposed health care can not be deferred for months or even years.

4. Each physician will read and sign the statement at the bottom of the page indicating his/her agreement and the date of the evaluation. There are lines below the signature that are intended to give the physician room to apply observations that were noted during their examination. For instance, if the first physician filled out the majority of the information on the consent form, then the second physician may add additional observations during their independent evaluation. An issue that might be discussed here would be whether special programming could improve the person's ability to give consent in certain areas in the future.

Section III, - **SURROGATE SELECTION**

The AHCCA specifically defines a priority for surrogates, which is listed there.

1. Court Appointed Guardian - This is a person who has been appointed by a court to make decisions on behalf of a person who has been adjudicated incompetent. This is usually done through the probate court system and it is important to verify that the guardian actually has the authority to make health care decisions and not just conservator or financial decisions. If a guardian has been appointed, his/her name should be written here and a copy of the court order should be attached to this form.

2. Durable Power of Attorney - This is a person named in the durable power of attorney as a decision-maker. It must be determined if the attorney in fact has authority to make health care decisions. Again, copies of the legal document should be attached to this form.

3. Other Statutory Provision - This applies when another person or agency has been identified as having the legal authority to make health care decisions. A specific example might be if a person has been placed in Adult Protective Services under the Department of Social Services; that agency would have the legal responsibility for health care decisions.

4. A Spouse - A legally married spouse would be the fourth priority. It is important to make sure that the person is legally married. If they are divorced or legally separated; the spouse cannot be selected.

5. Parent or Adult Child of the Patient

6. Adult Sibling, Grandchild, or Grandparent

7. Relative by Blood or Marriage – This applies to a relative who is reasonably believed to have a close personal relationship with the person unable to consent. This could be an aunt, uncle, cousin, or other persons who have shown a consistent involvement and interest in the person.

8. Person Given Authority by Other Statutory Provision - This would refer to Facility Administrators, Executive Directors of DSN Boards or Executive Directors contracted service providers. This is the last priority and would only come into play if all of the above were not applicable.

When going down the surrogate selection list, write in N/A for not applicable in each category until you come to the first one where a surrogate is available, and then write in the full name of that person. Then go down to the primary surrogate designation and again write in this person's full name, address, and phone number. It is important that the treatment team/key staff specifically follow the surrogate priority exactly and make every effort to contact the primary surrogate in order to obtain consent for the proposed health care. If an emergency occurred and one needed to obtain consent quickly, all reasonable efforts should be exhausted with the primary surrogate before one should proceed to the next surrogate to obtain consent. It is important that if there is family discord at the same priority level then the surrogate selection process would not apply and it would be necessary to proceed to the probate judge for an official court appointed guardian.

Other Points to Remember About This Document

1. This form refers only health care for persons unable to consent.
2. This form applies only to adults unless a minor child has been married legally or is emancipated.
3. Specific examples of the person's inability to consent must be stated, such as, "non-verbal," "unable to follow a two-step command," and "unable to remember the two health care options." **Just writing mental retardation under the nature is insufficient documentation of their inability to consent**.

4. It is important to note whether the disability is a chronic condition and to give suggestions for possible areas of programming that may improve the person's ability to give an informed consent at a future date.
5. Surrogate selection – Must follow the list according to the priority. This is specified in the state's statue. If persons of equal priority disagree on whether certain health care should be provided, the health care provider or any person interested in the welfare of the person may petition the probate court for an order to determine what care should be provided or for the appointment of a temporary or permanent guardian. Priority should not be given to a person who the health care provider determines is not reasonably available, unwilling, or unable to make health care decisions for the person. If, prior to becoming unable to consent, the person expressed a desire that certain person(s) not be involved in his/her health care decisions, those desires must be respected, and the next available person on the priority list with the highest priority may act as a surrogate. The AHCCA does not authorize surrogate health care decisions if the person is only temporarily unable to consent and the health care provider or attending physician determines that a delay occasioned by postponing the health care/treatment will not result in significant determent to the person. A person authorized to make health care decisions as a surrogate must base those decisions on the person's wishes when he/she was able to consent

to the extent that those wishes can be determined. If those wishes can not be determined, the surrogate must base the decision on the person's best interest. A person selected as a surrogate under the AHCCA may consent or withhold consent to health care for the person. The AHCCA does not authorize the provision of health care when the physician or health care provider has actual knowledge that the health care is contrary to the religious beliefs of the person or contrary to the person's unambiguous and uncontradicted instructions expressed at a time when he/she was able to consent. The next surrogate can be used if the health care professional is of the opinion that a delay due to attempts to locate the primary surrogate may be detrimental to the health and the well being of the person. If the health care provider and treatment team responsible for the care of the person who is unable to consent feels that the surrogate is not acting in the person's best interest, the Treatment Team/key staff may elect to petition the Probate or Family Court for appointment of a guardian. This will help to resolve differences of opinion, especially if the family is unable to resolve the conflicts on their own. If concerns or doubts arise, contact the Legal Department of DDSN for guidance.